

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BERT NELSON, JED NELSON AND BARRY NELSON	:	DETERMINATION
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioners, Bert Nelson, Jed Nelson and Barry Nelson, 955 Front Street, Uniondale, New York 11553, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law (File No. 805448).

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 20, 1990 at 9:45 A.M., with all briefs to be submitted by May 29, 1990. Petitioners appeared by D'Amato, Forchelli, Libert, Schwartz, Mineo & Carlino, Esqs. (Peter Alpert, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUE

Whether petitioners filed a petition for an administrative hearing within 90 days from the issuance of a Denial of Refund Claim by the Division of Taxation.

FINDINGS OF FACT

Petitioner Bert Nelson and his two sons, petitioners Jed and Barry Nelson, operate a real estate appraisal firm. They also made an excellent real estate investment on Long Island. On February 12, 1985, they purchased property in North Merrick, New York for \$1,600,000.00 which they sold less than two years later for \$3,619,000.00. By the time of the sale on December 15, 1986, petitioners had divided the property into two parcels and sold them in

separate transactions: one parcel was sold for \$2,669,000.00 to Jerusalem Merrick Development, Inc., and the second parcel was sold for \$950,000.00 to Barclay Construction at Cedarhurst, Ltd.

Petitioners agree that the real property transfer gains tax was due in the amount of \$137,101.51 on the transfer of the parcel sold for \$2,669,000.00. However, they paid the gains tax of \$59,794.89 on the transfer of the second parcel sold for \$950,000.00 under protest. Bert Nelson testified:

"[W]hen we closed on the transaction, we paid a state tax, which state tax, pardon the pun, was called a Cuomo tax. I was under the impression that it did not apply to us. In order to close, we had to pay it, otherwise we could not -- the title company wouldn't accept conveyance of the property."

On June 16, 1987, petitioners filed a claim requesting a refund of \$59,794.89, the real property transfer gains tax paid on the transfer of the second parcel. The claim consisted of a lawyer's brief and 15 exhibits attached to the appropriate Department of Taxation and Finance form. Petitioners argued that the transfers of the two parcels were distinct and should not be aggregated. Therefore, since the consideration paid on the transfer of the second parcel was less than \$1,000,000.00, the real property transfer gains tax should not apply to such transfer.

The refund claim was rejected by the Division of Taxation in a letter to petitioners dated October 26, 1987 from the Central Miscellaneous Tax Section. The Division did not present any evidence of the mailing of this denial letter. However, on cross-examination, petitioner Bert Nelson testified:

"[T]his [the denial of refund letter] came about the 26th or the 27th.... I would say somewhere toward the latter part of October, maybe the first couple of days in November when I spoke to Mr. Alpert about that letter."

Further, the parties by their counsel stipulated that "[t]he Department of Taxation & Finance denied the Nelsons' claim for a refund on October 26, 1987."

During the fall of 1987, Frida Nelson, the mother of Bert Nelson and grandmother of Jed Nelson and Barry Nelson, became seriously ill and was hospitalized. She died on January 15, 1988. It was not until after petitioners observed a mourning period that ended on January 24, 1988 that petitioners could address business concerns. The parties' counsel stipulated that "[o]n

January 25, 1988 the Nelsons filed a request for a Conciliation Conference." However, the record shows that the request for a conciliation conference was dated January 25, 1988 but not received by the Bureau of Conciliation and Mediation Services until January 26, 1988. The request was alleged to have been delivered by the courier service known as Federal Express.¹

Petitioners in their petition alleged as follows:

"In view of the personal tragedy which the Petitioners were subjected to during the ninety day period within which Petitioners had to file their Request for a Conciliation Conference, Petitioners respectfully request that their late submission be

deemed an excusable error and the order of the Conciliation Conferee be reversed."

At the formal hearing held herein, counsel for the parties described the issue to be resolved as follows:

"[ALJ:] The issue, Mr. Zalewski, for today's hearing?

Mr. Zalewski: Yes. The issue is a jurisdictional question dealing with the timeliness of a petition of a denial of refund that's dated October 26, 1987. Under Article 31-B, the petitioner had ninety days in which to petition the denial of their claim for refund.

It's the Division of Taxation's position that their petition of the denial was untimely in that it was filed after the ninetieth day from the date of the denial.

[ALJ:] Have you calculated the number of days late it was?

Mr. Zalewski: Yes. It was mailed on January 25th of 1988, which was the ninety-first day from the issuance of the denial letter.

[ALJ:] Mr. Alpert, would you like to restate the issue and/or make a brief opening statement?

Mr. Alpert: Yes, I would.

I guess I'd like to expand the issue to include whether there are reasons which would excuse a non-timely filing of a petition for a conciliation conference, and also whether pursuant to Section 3000.3(e) of the Tax Appeals Tribunal Rules of

¹In their petition, petitioners alleged that "[a]s a result of this situation [the illness and death of Frida Nelson] Petitioners did not forward their Request for a Conciliation Conference to the Bureau of Conciliation and Mediation Services until January 25, 1988, which they did by Federal Express delivery service." The Division's answer denied having knowledge and information of this allegation. Petitioners offered no proof or evidence concerning the manner of service of the request for conciliation conference.

Practice, the Judge may suspend action on a petition and refer the matter to the Bureau of Conciliation Services."

On March 20, 1990, prior to the commencement of the hearing herein, the parties by their counsel executed a stipulation of facts. Relevant portions have been incorporated into this determination.

SUMMARY OF THE PARTIES' POSITIONS

The Division of Taxation contends that the request for a conciliation conference was not filed within 90 days of the denial of petitioners' refund claim. Rather, it was filed on January 26, 1988,² 92 days after the denial. Because it was delivered by Federal Express, a courier service, the day of delivery is deemed the day of filing.

In contrast, petitioners contend that the request for a conciliation conference was timely filed. Petitioners had until Monday, January 25, 1988 to file the request because January 24, 1988, which was 90 days from the date of the letter denying the refund claim, was a Sunday. Under General Construction Law § 25-a(1), a legally required act may be done on the next succeeding business day if the period of time within which an act is authorized ends on a Sunday. Petitioners assert that the request was delivered to the courier service on January 25, 1988 and delivered the following day and should be considered timely. Petitioners also argue that the mailbox rule set forth in the CPLR should apply and the period to file the request should be extended to 95 days after the date of the letter denying the refund claim. In the alternative, petitioners contend that if it is determined that their petition was untimely filed, the extenuating circumstances concerning the illness and death of Frida Nelson should excuse the late filing of the request for a conciliation conference. Finally, petitioners assert that an administrative law judge has authority to suspend a petition and refer a matter for a conciliation conference.

CONCLUSIONS OF LAW

²However, the stipulation between the parties noted that "[o]n January 25, 1988 the Nelsons filed a request for a Conciliation Conference" (emphasis added).

A. Tax Law § 1445(2) provides, in part, as follows:

"The tax commission³ may grant or deny such application [for refund of real property transfer gains tax paid] in whole or in part and shall notify the taxpayer by mail accordingly. Such determination shall be final and irrevocable unless the applicant shall, within ninety days after the mailing of notice of such determination, apply to the tax commission for a hearing."

B. 20 NYCRR 4000.3 provides, in part, as follows:

"(a) Filing of request.

Any person who has received a statutory notice may request a conciliation conference by filing a written request...with the Bureau of Conciliation and Mediation Services...by mail....

* * *

(c) Time limitations.

The request must be filed within the time limitations prescribed by the applicable statutory sections for filing a petition for hearing in the Division of Tax Appeals, and there can be no extension of those time limitations.... A timely request for a conciliation conference suspends the running of the period of limitations for the filing of a petition for hearing...."

Pursuant to Tax Law § 1445(2) and this regulation, petitioners had 90 days from the mailing of the letter denying their refund claim to file their request for a conciliation conference.

C. The Tax Appeals Tribunal has emphasized that:

"[A]ny decision concerning the timeliness of petitions to the Division of Tax Appeals must necessarily begin with a review of the evidence related to the date and manner of mailing of either the Bureau's conciliation order or the Division of Taxation's statutory notice determining tax due" (Matter of Robert G. Wilson

& GSA Corporation d/b/a GSA Partners, Tax Appeals Tribunal, July 13, 1989).

Similarly, this decision concerning the timeliness of petitioners' request for a conciliation conference must begin with a review of the evidence related to the date and manner of mailing of the denial of petitioners' refund claim.

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Effective September 1, 1987, under Tax Law § 2026, references to the State Tax Commission in the Tax Law, in all instances other than in relation to the administration of the administrative hearing process, are deemed to refer to the Division of Taxation or Commissioner of Taxation and Finance. References to the State Tax Commission in the Tax Law in relation to the administration of the administrative hearing process are deemed to refer to the Division of Tax Appeals or the Tax Appeals Tribunal.

D. The Division in its brief asserted that "the petition filed in this matter readily concedes that a request for a conciliation conference was not timely filed." There is no such concession. It is true that petitioners in their petition referred to their submission requesting a conciliation conference as "late". However, at the hearing herein, the Division's representative stated the issue in a much broader fashion: whether the petition⁴ of the denial was untimely. Petitioners' representative then "expanded" the issue of timeliness to include "whether there are reasons which would excuse a non-timely filing of a petition...." Therefore, it cannot be concluded that petitioners conceded the untimeliness of their request for a conference. The question to be asked then is whether the letter denying petitioners' refund claim was mailed on October 26, 1987. There was no such concession of this point in the petition or at the hearing. The stipulation entered into by counsel for the parties prior to the commencement of the hearing noted agreement on the point that "[t]he Department of Taxation & Finance denied the Nelsons' claim for a refund on October 26, 1987." But there was no agreement stated in the stipulation concerning the date on which the denial letter was mailed.

If the Division's position is upheld, petitioners lose the right to have the merits of their claim reviewed. To cut off a taxpayer's right to be heard, the Division of Taxation must be sure to prove the timely mailing of the so-called "statutory notice", which the taxpayer wishes to challenge. The Division could have accomplished this by introducing documentary or testimonial evidence of the date of such mailing. This it failed to do. In the absence of such proof, the Division cannot rely on anything less than an expressed concession of the date of mailing, and petitioners did not expressly concede that the denial letter was mailed on October 26, 1987.

As noted in Finding of Fact "4", supra, the Division's representative came very close to proving the date of mailing of the denial letter by his cross-examination of petitioner Bert

⁴The parties have frequently referred to the request for a conciliation conference as a petition.

Nelson. However, Mr. Nelson ultimately concluded that he was not sure when he received it: "somewhere toward the latter part of October, maybe the first couple of days in November...."

E. It is noted that petitioners' arguments, as set forth in paragraph "9", supra, are without merit. The late filing of a petition or a request for a conciliation conference cannot be excused by a personal tragedy or extenuating circumstances (see, Matter of Frank Perillo and Lucy Perillo, Tax Appeals Tribunal, August 2, 1990; Matter of Daniel B. Rathgaber, Tax Appeals Tribunal, April 5, 1990). Further, the mailbox rule under CPLR 2103(b)(2) is clearly limited to service of legal papers upon an attorney and does not serve to extend the 90-day limitation period herein. Finally, 20 NYCRR 3000.3(e) which permits an administrative law judge to suspend a petition and refer a matter for a conciliation conference is predicated upon a timely petition and also requires the consent of the law bureau, the Division of Taxation's representative herein.

F. The petition of Bert Nelson, Jed Nelson and Barry Nelson is granted to the extent that this matter is remanded to the Bureau of Conciliation and Mediation Services for further proceedings not inconsistent herewith.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE